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Codes

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 875

THOMAS N. BURBRIDGE, LILY KOWALSKI, CAROLYN MULLEN, SUSAN CLOKE, MARGOT LIEBERMAN, KENNETH S. KING, ROBERT H. JOHNSON, RICHARD H. MIKESELL, ALLEN W. JOHNSON and ESTHER M. JOHNSON,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

The opposition of Respondent fails completely to come to grips with any of the main issues raised in the Petition. Respondent's argument seems to be that because:

1. Petitioners' conduct, in the opinion of Respondent, was blatant and outrageous and

2. Petitioners apparently anticipated arrest; therefore,

3. The validity of the statutes under which they were charged and

4. The propriety of the methods by which they were convicted are not of proper concern to this Court. It is probably enough to say that this unique contention, if accepted, would destroy the concept of due process and the whole idea of judge-made law and it would, of course, have made unnecessary and impossible all of this Court's prior determinations in civil rights and criminal cases. But with specific reference to this case, petitioners again draw the Court's attention to the following:

1. Respondent has not met Petitioners' arguments contained essentially on pages 12 and 13 and 17 and 18 of the Petition that they have been convicted of doing a "lawful act" in violating § 407 and, apparently, in continuing conduct identical both inside and outside the premises, while at the same time they have been convicted of an "unlawful act" in violating § 602j for doing the same thing. These convictions are either evidence of inconsistent verdicts, cf. *Dunn v. United States,* 284 U.S. 390 (1932), of the invalidity of § 407, of a denial of due process in prosecuting on inconsistent counts or of some variation of the doctrine of consent. Cf. *Raley v. Ohio,* 360 U.S. 423 (1959).

2. Respondent has not contested the applicability of *Bouie v. South Carolina,* 378 U.S. 347 (1964) to this case. The doctrine of trespass ab initio is the sole

catalyst for reconciling the charges and convictions in this case and without more, Respondent's concession on this point would seem to require reversal.

3. *People v. Kerrick,* 86 C.A. 542, 261 P. 756 (1927), cited by Respondent as sustaining § 407, is a homicide case and it is clearly distinguishable in the number of people involved, in the result of the activities and in the conduct of the defendant. The case did not involve conflicting convictions for "lawful" and "unlawful" activities and it was, of course, decided in an entirely different constitutional climate.

4. In case it be thought that Respondent is making some sort of mute argument of mootness arising from the commutation of Doctor Burbridge's sentence, it should be noted that this commutation is *not* a pardon and does not remove the conviction from Doctor Burbridge's record. Cf. *Pollard v. United States,* 352 U.S. 354 (1957). Of course, the sentences of the other, younger petitioners have not been served or commuted and their convictions also still stand to mar their records with all that a criminal conviction implies for future activities, employment and reputation.

Dated, San Francisco, California,
April 24, 1967.

Respectfully submitted,
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HARTLY FLEISCHMANN,
Attorneys for Petitioners.